In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

MISC. NO. 75-1051

HAROLD E. BLACK, SUPERINTENDENT,
KENTUCKY STATE REFORMATORY ------PETITIONER

V.

JOHN ALLEN MINOR, ----------RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	i
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2-7
SUMMARY OF THE FACTS	7-8
REASONS FOR GRANTING THE WRIT	9-15
CONCLUSION	15-16
PROOF OF SERVICE	16
APPENDIX	1a-24a, 1b-5b, 1c-9c

TABLE OF CITATIONS

Cases: Page

Agnellino v. *State of New Jersey*, 493 F. 2d 714 (3rd Cir., 1974) 14

Deats v. *Rodriquez*, 477 F. 2d 1023 (10th Cir., 1973) 14

Harris v. *New York*, 401 U.S. 222 (1971) 11, 12, 13, 14

Johnson v. *Patterson*, 475 F. 2d 1066 (10th Cir., 1973) 14

Michigan v. Mosley, 44 U.S.L.W. 4015 (U.S., December 9, 1975) 11

TABLE OF CITATIONS (Continued)

Cases — Page

Minor v. *Commonwealth*, 478 S.W. 2d 716 (1971) 5

Miranda v. *Arizona*, 384 U.S. 436 (1966) 10, 11

Oregon v. *Hass*, 420 U.S. 714 (1975) 11

Raffel v. *United States*, 271 U. S. 494 (1926) 12

United States v. *Anderson*, 498 F. 2d 1038 (D.C. Cir., 1974) 14

United States v. *Fairchild*, 505 F. 2d 1378 (5th Cir., 1975) 13

United States v. Hale, 422 U.S. 171 (1975) 14

United States v. *Ramirez*, 441 F. 2d 950 (5th Cir.), cert denied, 404 U. S. 869, rehearing denied, 404 U. S. 987 (1971) 13

United States ex rel Burt v. State of New Jersey, 475 F. 2d 234 (3rd Cir., 1973) 13

Williams v. *Florida*, 399 U.S. 78 (1970) 14, 15

STATUTE:

28 U.S.C. § 1254 (1) 2

MISCELLANEOUS AUTHORITIES:

Rule 11.42, Kentucky Rules of Criminal Procedure 2

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HAROLD E. BLACK, SUPERINTENDENT, KENTUCKY STATE REFORMATORY .....PETITIONER

V.

JOHN ALLEN MINOR, ...RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Harold E. Black, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided December 8, 1975.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit in this case is as yet unreported. The opinion and order is set out in full in the Appendix, 1a-24a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on December 8, 1975. This petition for a writ of certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER A DEFENDANT'S SILENCE IN THE FACE OF POLICE ARREST CAN BE USED AT TRIAL TO IMPEACH HIM AFTER HE HAS VOLUNTARILY TAKEN THE STAND AND OFFERED TESTIMONY WHICH IS INCONSISTENT WITH HIS EARLIER SILENCE.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

John Allen Minor, respondent herein, was tried and convicted of armed robbery and murder by jury on June 11, 1969, in the Jefferson Circuit Court, Louisville, Jefferson County, Kentucky. He was sentenced to life on each count, the terms to run concurrently. A motion for a new trial was denied. A direct appeal was not taken. In 1970, Minor filed a motion to vacate the judgment and conviction pursuant to Kentucky's post-conviction relief criminal rule, Rule 11.42, Kentucky Rules

of Criminal Procedure. The motion was overruled but Minor was granted a belated appeal to the Kentucky Court of Appeals.

The issue involved in this petition for certiorari herein was raised on the appeal to the Kentucky Court of Appeals. Minor, testifying at his trial, asserted the alibi defense that he was home asleep. During cross-examination by the Commonwealth attorney, without objection by the defense counsel, Minor was asked why he had not told the police of his alibi when he was arrested. During the cross-examination the following questions and answers took place.

> "Q. Now, tell this jury, please, if you have ever told between June 28th, 1968 and this good day June 11th, 1969, if you'd ever told the story before to anyone, including the police, that you were home this night asleep.
>
> "A. Yes, well, I discussed it with my attorney.
>
> Q. I understand that. I'm asking if you told the police that night when you went to headquarters or if you ever told anyone besides your attorney until this good day that you were at home that night?
>
> Mr. Shobe: I will stipulate, Your Honor, that I advised my client not to discuss this with the police.
>
> Mr. Ousley: Oh, no, Mr. Shobe, I'm not saying anything about you. I'm just asking the question if he told anyone besides his attorney.

The Court: Overruled. I'm going to let the witness answer.

A. I hadn't discussed anything with anyone other than my lawyer.

Mr. Ousley: I understand, that's what you are telling the jury. You did not tell the police a year ago this story that you're telling the jury today, did you?

A. No, I–

Q. On the advice of your attorney. I understand that; correct?

A. Correct.

Q. You never told anyone else; correct?

A. Correct."

(Trial Transcript, 60-61.)

Also, in the Commonwealth attorney's closing argument to the jury, again without defense objection, Minor's alibi was attacked as follows:

> "And here's something that I do not understand and I've been at this game a long time. If you are wanted for a crime you didn't commit and you knew police were looking for you, any decent, good citizen would go to the police and say, 'I was at home in bed.' What happened here? Nearly a year later

> he comes up with this phony alibi . . . 'I was at home in bed.' Now, I submit, think about that. If you were charged with an offense or if I am, or the Judge is, why, the first thing we would do would be to go to the police . . . 'Mr. Policeman, you're all wrong. I was at home in bed and my two sisters will tell you that.' But, oh no, McGoffney, who was down there, told the police he saw two men. The police immediately draw these two mugs. Of course! Good police work. And not until a year later — 'I'll tell you nothing' — not quoting the evidence literally — 'I'll tell you nothing. Prove it on me.' And he told them nothing on the advice of his counsel, and I'm not criticizing counsel, that was proper advice, and a year later — 'I was home in bed.' And who says he was home in bed? I'm not going to comment. His good aunt, who, of course, didn't see him after 10:00 o'clock on the 27th, and his two sisters. Someone is mistaken or not telling the truth." (Trial Transcript, 87-88.)

The Kentucky Court of Appeals affirmed Minor's conviction, finding that he had not made sufficient objection at the trial to authorize appellate review. *Minor v. Commonwealth*, 478 S.W. 2d 716 (1971), Appendix, at 1b-5b. This Court denied certiorari, 409 U.S. 1064 (1972).

On March 27, 1973, the United States District Court for the Western District of Kentucky, Honorable James F. Gordon, entered an order dismissing Minor's petition for writ of habeas corpus. With respect to the matter in issue herein, the district court held the closing state-

ments of the prosecution were not so improper in the context used as to constitute an infringement upon Minor's Fifth or Fourteenth Amendments rights. Minor appealed that order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit remanded the case back to the district court to reconsider Minor's claims based upon an examination of the state court proceedings or an evidentiary hearing.

On reconsideration, after examining the state court transcript and record, the district court, in an order dated May 10, 1974, with a prior memorandum dated March 28, 1974, again found that the closing argument of the prosecution was fair comment on Minor's credibility and was in no way violative of his Fifth or Fourteenth Amendments rights and dismissed the habeas corpus petition Appendix, 1c-9c.

Thereafter, Minor again appealed the district court's final order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the decision of the district court and remanded the case to the district court with instructions to grant the writ of habeas corpus unless the Commonwealth proceeds to retry Minor within a reasonable time but to await the outcome of any proceedings by the Commonwealth to this Court. Appendix, 1a-24a. The Sixth Circuit held that the cross-examination and closing argument by the Commonwealth attorney was error of constitutional magnitude because Minor's silence was not sufficiently inconsistent with his trial testimony to permit use of that silence to impeach his testimony and that the admission of evidence of and comment on the silence violated Minor's right to remain silent. It is from this order of the United States Court of Appeals for the Sixth Circuit that a review is sought.

SUMMARY OF THE FACTS

In order for this Court to have a synopsis of the trial testimony relative to the background facts of this case, we refer the Court to the Memorandum Order of the district court dated March 28, 1974, in pertinent part, as follows: (Minor referred to as petitioner)

> "During the early morning hours of June 28, 1968, the murder victim, Carroll Mulliken, and a friend, Wesley Albright, both had been 'bar hopping' for several hours. While enroute in Albright's car to another bar, at about 1:30 a.m., they were hailed over on 18th Street between Oak and Dumesnil by a man identified by Albright to be the petitioner. The latter offered to escort them to a nearby house where they could play cards, and he got into the automobile. Following his directions they went around the corner, stopped and got out of the car. They started back between two buildings when a fourth individual appeared. Petitioner and the newly arrived individual pulled guns. In Albright's words:
>
> > 'Both of them pulled revolvers out of their pocket and said they wanted our money. One man took my watch and wallet. Mulliken tried to grab the gun and when he did, the man went

backwards. He sorta' went side of the building and I heard a gun go off. When this happened, the other man put a gun to my head and told me not to make a move.' (T.E. 15)

"According to Albright, the man wrestling with Mulliken was petitioner. Other testimony estabished that Mulliken died from the gunshot wound.

"Ronald McGoffney, who said he had known petitioner 'for a long time' while riding by on 18th Street between Oak and Dumesnil saw the co-defendant talking to 'two white boys' who were in a car and the petitioner was sitting in his car nearby. He stated the time was about 1:30 a.m. and the location was about a half block away from the scene of the shooting. He stopped at a nearby service station to chat with a friend and was there some few minutes later when Albright came in to call police and report the robbery and shooting. He was at the scene when the police arrived and reported to them that he had seen petitioner and Wilson in the area earlier.

"Petitioner testified that on the night of June 27, he arrived home about 8 p.m., had dinner, and went to bed shortly thereafter and did not leave the house until after 9 a.m. the following day. Two sisters and an aunt testified to the same effect. He learned late on June 28 that the police were looking for him and on July 2 with his attorney he went to police headquarters. He made no statements concerning the accusations, on advice of counsel * * *"

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important constitutional issue which has not been but should be decided by this Court.

Reason for granting the writ is the direct conflict between the decisions of the United States Circuit Court of Appeals for the Tenth Circuit, District of Columbia Court of Appeals Circuit, and now the Sixth Circuit with the Third Circuit and Fifth Circuit. This decision of the Sixth Circuit involves the constitutional issue of whether, after a defendant has voluntarily taken the stand, an inquiry, on cross-examination, into the defendant's prior inconsistent silence, and comment on same, impermissibly prejudices the defendant's right to remain silent. The decision of the Sixth Circuit on this constitutional issue was that such cross-examination and comment by the prosecution did violate Minor's right to remain silent. This Court should note that this decision is in direct conflict with the Third and Fifth Circuit Courts of Appeal and with the decision of the Court of Appeals of Kentucky.

Petitioner submits the cross-examination of Minor on the witness stand and comment in closing argument by the prosecution as to the inconsistency of Minor's prior silence at the time of his arrest with his alibi at trial of being home asleep, did not violate his Fifth and Fourteenth Amendments rights against compelled self-incrimination. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." Rather than a violation of the Fifth Amendment right against self-incrimination,

we believe the true nub of the issue involves the matter of credibility and search for truth after an accused has voluntarily taken the witness stand to testify in his own behalf, thereby having waived his right to remain silent.

We also submit the cross-examination of Minor herein did not violate the right to silence as expressed in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In that decision this Court concluded that a defendant had the right to be advised that he could maintain silence in the face of police interrogation. This Court further stated at 468, n. 37:

> "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Cf., Griffin* v. *California,* 380 U.S. 609 (1965); *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964) . . ."

This quotation from *Miranda* is footnote dictum. In the present case the record does not reflect that the so-called *Miranda* warnings were given to Minor. The important thing is, however, that Minor did not talk to the police. On the advice of counsel he turned himself in to the police and said nothing. And possibly even more important it should be noted that in *Miranda* the defendant apparently never took the stand, whereas in the present case Minor took the stand to tell his story.

Thus, we believe the *Miranda* decision is not applicable to the constitutional issue in question. Minor never claimed his privilege in the face of accusation; there

was no interrogation by the police. Cf. *Michigan* v. *Mosley,* 44 U.S.L.W. 4015 (U.S., December 9, 1975). Rather, it is submitted that the issue of whether a defendant can be cross-examined about his prior inconsistent silence is substantively such as to come within the rationale of this Court's decision in *Harris* v. *New York,* 401 U.S. 222 (1971). See also *Oregon* v. *Hass,* 420 U.S. 714 (1975). In *Harris* this Court held that a defendant could be impeached by prior inconsistent utterances made at the time of arrest even though the utterances were made before the defendant had been advised of his *Miranda* rights if he took the stand to testify. This holding was made even in view of the shield provided by *Miranda,* and this Court, in *Harris,* spoke of that shield as follows:

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury . . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . .
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from risk of confrontation with prior inconsistent utterances. 401 U.S. at 225-226, 91 S. Ct. at 645-646."

In the present case it must be re-emphasized that when the police arrested Minor on murder and armed

robbery charges after turning himself in to the police, he made no statement to them whatsoever. Yet, nearly a year later when Minor's case came to trial he took the witness stand to testify in his own defense to impress the jury with his defense that at the time the criminal offenses took place he was home asleep and that he had witnesses to prove and support this alibi. Surely the truth-finding process does not require the jury to hear the testimony of a defendant without the possibility of the prosecution to challenge and make known to the jury that the defendant had failed to explain or raise this matter before his testimony at trial. The prosecution should be able to cross-examine a defendant who takes the stand as to those matters raised by the defendant's own testimony. Without such cross-examination the objective of getting at the truth is severely hampered. An accused has no constitutionally protected right to testify to the jury about himself without being placed in a position to be effectively cross-examined in keeping with the truth-testing process of the adversary system.

Petitioner submits that when Minor took the stand, the prosecution was well within the bounds of constitutional propriety, in light of the rationale of *Harris* v. *New York,* supra, to cross-examine Minor and speak in closing argument to the matter of his credibility by showing that his silence before trial and the alibi testimony at trial were inconsistent. We believe this Court's decision in *Raffel* v. *United States,* 271 U.S. 494 (1926)

supports this position. Of the conflicting Circuits in support of petitioner's argument herein is *United States* v. *Ramirez,* 441 F. 2d 950 (5th Cir.), cert. denied, 404 U.S. 869, rehearing denied, 404 U.S. 987 (1971) wherein the Fifth Circuit applied the *Harris* rationale and held that once a defendant elected to testify and assert the defense of coercion he became subject to the traditional truth-testing device of the adversary process, including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest. See also *United States* v. *Fairchild,* 505 F. 2d 1378 (5th Cir., 1975), where the Fifth Circuit stated that for evidence of silence to be admissible the silence must be more than ambiguous; that there must be, as we have in the present case, an act blatantly inconsistent with the defendant's trial testimony. The Fifth Circuit further stated that such a situation would be when the exculpatory testimony is of such a character that reasonable men would be left with the distinct impression that had it been true it would have been related to law enforcement even though the defendant was specifically informed that he need not speak. See also the Third Circuit Court of Appeals decision following the holding of *Ramirez* in *United States ex rel Burt* v. *State of New Jersey,* 475 F. 2d 234 (3rd Cir., 1973), where in issue was the prosecutorial questioning concerning the accused's attitude and actions being inconsistent with his trial testimony. See additionally the detailed analysis of the use of an ac-

cused's silence for impeachment in *Agnellino* v. *State of New Jersey,* 493 F. 2d 714 (3rd Cir., 1974).

The Tenth Circuit Court of Appeals and the District of Columbia Circuit have held the rationale of *Harris* inapplicable and thus prohibited reference for impeachment purposes to an accused's pretrial silence. See *Johnson* v. *Patterson,* 475 F. 2d 1066 (10th Cir., 1973), but note Judge Breitenstein's dissenting opinion; *Deats* v. *Rodriguez,* 477 F. 2d 1023 (10th Cir., 1973), but note Judge Barrett's dissenting opinion; and *United States* v. *Anderson* (and *United States* v. *Hale*), 498 F. 2d 1038 (D. C. Cir., 1974), but note Judge Wilkey's dissenting opinion.

This Court reviewed *United States* v. *Hale,* 422 U.S. 171 (1975). It is noted, however, that in the *Hale* case involving a federal conviction, in issue was whether a defendant can be cross-examined about his silence during police interrogation. It is further specifically noted that this Court's decision in *Hale* was not on the ground that there had been a violation of his constitutional rights. This Court, exercising its supervisory powers over the administration of justice in the federal courts, held that the cross-examination and comments of the prosecution concerning Hale's prior silence constituted, under the circumstances of that case, prejudicial error. The present case in contrast was a state prosecution and the constitutional issue left unanswered by this Court's decision in *Hale* was reached by the Sixth Circuit.

Lastly, we note that in *Williams* v. *Florida,* 399 U.S. 78 (1970), this Court held that the Fifth Amendment

did not forebid a state from requiring a defendant to notify the prosecution at an early date of his alibi defense and witnesses. This Court stated in *Williams* as follows:

> ". . . Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the state's case before announcing the nature of his defense, anymore than it entitles him to await the jury's verdict on the state's case in chief before deciding whether or not to take the stand himself." 399 U.S. 85.

The Commonwealth of Kentucky does not have a "notice of alibi statute" and consequently the prosecution has no opportunity until the time of trial to scrutinize a defendant's alibi defense. In the present case the prosecution had no way of knowing until the day of trial what was the nature of petitioner's defense. For the foregoing reasons, inasmuch as Minor voluntarily took the stand and voluntarily testified, thereby waiving his right to remain silent, he was under an obligation to speak truthfully and accurately and the prosecution here did no more than utilize the traditional truth-testing defenses of the adversary process. Such actions by the prosecution in this case did not violate any of Minor's constitutional rights.

CONCLUSION

Petitioner submits that it is necessary for this Court to review the decision of the Sixth Circuit to settle the conflict between the Circuit Courts on the important con-

stitutional issue of whether a defendant's silence in the face of police arrest can be used at trial to impeach him after he has voluntarily taken the stand and offered testimony which is inconsistent with his earlier silence.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert L. Chenoweth, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Mr. John Allen Minor, petitioner herein, Blackburn Correctional Complex, 3111 Spurr Road, Lexington, Kentucky 40505, and to Hon. Martin Baker, counsel for petitioner, 620 Citizens Building, Cleveland, Ohio 44114, this January 21, 1976.

Robert L. Chenoweth

ROBERT L. CHENOWETH
Assistant Attorney General
Commonwealth of Kentucky

APPENDIX

No. 74-2242

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN ALLEN MINOR, ... PETITIONER-APPELLANT,

V.

HAROLD E. BLACK, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ... RESPONDENT-APPELLEE,

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Appeal From The United States District Court For The Western District of Kentucky At Louisville

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Decided And Filed December 8, 1975.

Before: Phillips, Chief Judge, and Weick and Peck, Circuit Judges.

Peck, Circuit Judge, delivered the opinion of the Court, in which Phillips, Chief Judge, joined. Weick, Circuit Judge, (pp. 10-20) filed a dissenting opinion.

Peck, Circuit Judge. Petitioner-appellant, testifying at his state court trial on armed robbery and murder charges, asserted the alibi that he was home asleep. On cross-examination, the prosecutor elicited without objection from petitioner his failure, when arrested, to tell the police of his alibi, petitioner explaining his post- arrest

silence as being "[o]n the advice of [his] attorney."[1] In his closing argument to the jury, the prosecutor, also without defense objection, emphasized:

> [H]ere's something that I do not understand and

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[1] "Q. Now, tell this jury, please, if you have ever told between June 28th, 1968 and this good day June 11th, 1969, if you'd ever told the story before to anyone, including the police, that you were home this night asleep.

"A. Yes, well, I discussed it with my attorney.

"Q. I understand that. I'm asking if you told the police that night when you went to headquarters or if you ever told anyone besides your attorney until this good day that you were at home that night?

"Mr. Shobe: I will stipulate, Your Honor, that I advised my client not to discuss this with the police.

"Mr. Ousley: Oh, no, Mr. Shobe, I'm not saying anything about you. I'm just asking the question if he told anyone besides his attorney.

"The Court: Overruled. I'm going to let the witness answer.

"A. I hadn't discussed anything with anyone other than my lawyer.

"Mr. Ousley: I understand, that's what you are telling the jury. You did not tell the police a year ago this story that you're telling the jury today, did you?

"A. No. I —

"Q. On the advice of your attorney. I understand that; correct?

"A. Correct.

"Q. You never told anyone else; correct?

"A. Correct."

Trial Transcript 60-61.

> I've been at this game a long time. If you are wanted for a crime you didn't commit and you knew police were looking for you, any decent, good citizen would go to the police and say, 'I was at home in bed.' What happened here? Nearly a year later he comes up with this phony alibi—'I was at home in bed.' Now, I submit, think about that. If you are charged with an offense or if I am, or the judge is, why, the first thing we would do would be to go to the police — 'Mr. Policeman, you're all wrong. I was at home in bed and my two sisters will tell you that' . . . . [But] not until a year later — 'I'll tell you nothing — not quoting the evidence literally — 'I'll tell you nothing. Prove it on me.' And he told them nothing on the advice of his counsel, and I'm not criticizing counsel, that was proper advice, and a year later — 'I was home in bed.' . . . Some one is mistaken or not telling the truth." Trial transcript 87-88.

The state court jury convicted petitioner of armed robbery and murder, and petitioner was sentenced to two concurrent terms of life imprisonment. The state court of appeals affirmed the convictions, although "condemning" the prosecutor's closing argument that petitioner should have "go[ne] to the police" to explain his whereabouts. That court, however, found insufficient prejudice to petitioner's substantial rights to warrant reversal stemming from the prosecutorial argument that petitioner should have told the police of his alibi when he reported to the police three days after the commission of th crime, at least in the absence of timely objection to the

argument. *Minor* v. *Commonwealth,* 478 S.W. 2d 716, 718 (Ky. 1971), *cert. denied,* 409 U.S. 1064 (1972).

Thereafter, petitioner filed the instant petition for writ of habeas corpus challenging, *inter alia,* the closing argument as infringing upon his constitutional right to remain silent in the wake of police interrogation. The district court, examining the trial transcript and finding an evidentiary hearing unnecessary, dismissed the petition because the closing argument "was fair comment on petitioner's credibility" and "not violative of his Fifth and Fourteenth Amendment rights."

On the instant appeal of that dismissal, petitioner claims, *inter alia,* that the cross-examination and closing argument infringed upon his constitutional right of due process and his constitutional privilege from compelled self-incrimination. Respondent counters that the cross-examination and closing argument were permissible because *Harris* v. *New York,* 401 U.S. 222 (1971), has established that *Miranda* v. *Arizona,* 384 U.S. 436 (1966), "cannot be perverted into a license to use perjury by way of a defense." 401 U.S. at 226.

Of course, had petitioner been convicted in federal rather than a state. court, the admission of evidence of his pretrial silence presumably would have been reversible error. *United States* v. *Hale,* 95 S. Ct. 2133 (1957), "in the exercise of [the Court's] supervisory authority over the lower federal courts," invalidated cross-examination concerning pre-trial silence "under the circumstances of [that] case." *But see United States* v. *Grubb,* No. 75-1028, 75-1029 (7th Cir., filed June 26, 1975), *petition for cert. filed,* 44 U.S.L.W. 3069 (July 25, 1975) (No. 75-

137). *Hale* did not,[2] as we must, decide the constitutional issue, but many of the policy factors favoring the exercise of the federal courts' supervisory power, *to wit,* the prejudice and ambiguity of pre-trial silence, also favor holding that the admission of such testimony violates constitutional standards.

Unless *Harris* permits the cross-examination and argument as impeaching petitioner's credibility, such cross-examination and argument was error. *Miranda* explicitly recognized that

> "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that [the individual] stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n. 37.

Moreover, this court, prior to *Harris,* had held that cross-examination of a defendant into his failure to inform law enforcement officials earlier of his exculpatory trial

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[2] Even more recently, the Supreme Court denied certiorari in People v. Moore, 55 Mich. App. 678, 223 N.W. 2d 302 (1974), cert. denied sub nom. Michigan v. McFarland, 44 U.S.L.W. 3206 (Oct. 6, 1975). The state's petition for certiorari presented the question whether the Fifth Amendment bars cross-examination of defendant concerning his invocation of the privilege against self-incrimination and resulting failure to offer arresting officers exculpatory information testified to at trial. The state court of appeals had held that such cross-examination was reversible error, the state court citing People v. Bobo, 390 Mich. 355, 212 N.W. 2d 190 (1973), which founded the error on the "constitutional right to remain silent."

testimony was plain error "of constitutional magnitude." *United States v. Brinson,* 411 F. 2d 1057 (6th Cir. 1969).

Harris permits statements elicited in violation on *Miranda,* and, arguably, silence in compliance with *Miranda,* to be admitted to impeach petitioner's credibility if, but only if, those statements or silence is sufficiently "trustworth[y]," "sharply contrast[ing]," or "inconsistent" with the testimony to be impeached. *Harris,* supra, 401 U.S. at 224-26. We hold that the instant cross-examination and closing argument was error of constitutional magnitude because, petitioner's silence not being sufficiently inconsistent with his trial testimony to permit the use of that silence to impeach his testimony, the admission of evidence of and comment on such silence violated petitioner's right to remain silent. As Judge Breitenstein framed the issue in a comparable case,

> "The use of pre-trial silence for impeachment depends on whether, *in the circumstances presented,* there is such inconsistency between silence and testimony as to reasonably permit the use of silence for credibility impeachment." Breitenstein, J., dissenting in *Johnson* v. *Patterson,* 475 F.2d 1066, 1070 (10th Cir.), *cert. denied,* 414 U.S. 878 (1973) (emphasis supplied).

Other courts have similarly found such silence insufficiently inconsistent, *e.g., Deats* v. *Rodriquez,* 477 F.2d 1023, 1025 (10th Cir. 1973), *Patterson, supra,* 475 F. 2d at 1068 "[S]ilence at the time of arrest is not an inconsistent or contradictory statement. Silence at the time of arrest is simply the exercise of a constitutional right. . . ."), *People* v. *Bobo,* 390 Mich. 355, 212 N.W.

2d 190 (1973), *Sutton* v. *State,* 25 Md. App. 309, 334 A. 2d 126, 130-1133 (1975), *Commonwealth* v. *Bennett,* —— Mass. App.——, 317 N.E. 2d 834 (1974), but see *United States* v. *Harp,* 513 F.2d 786, 790 (5th Cir. 1975), *United States* v. *Quintana-Gomez,* 488 F. 2d 1246 (5th Cir. 1947), *United States ex rel. Burt* v. *State of New Jersey,* 475 F. 2d 234, 237 (3rd Cir.), *cert. denied,* 414 U.S. 938 (1973), *United States* v. *Ramirez,* 441 F. 2d 950, 953-54 (5th Cir.),*cert. denied,* 404 U.S. 869 (1971), *Lebowitz* v. *State,* 313 So. 2d 473 (Fla. App. 1975), *State* v. *Mink,* 23 N.C. App. 203, 208 S.E. 2d 522, *cert. denied,* 286 N.C. 340, 211 S.E. 2d 215 (1974), *Commonwealth* v. *Jennings,* —— Pa. Super. ——, 338 A. 2d 598 (1975), especially with the suspect remaining silent knowing of his right to remain silent, *Hale, supra,* 95 S. Ct. at 2137 ("[Respondent] had just been given the *Miranda* warnings and was particularly aware of his right to remain silent and the fact that anything he said could be used against him. Under these circumstances, his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct"), *United States* v. *Fairchild,* 505 F.2d 1378, 1382 (5th Cir. 1975) ("After [defendant] had been informed that he had the right not to speak until his lawyer was present he did what a reasonable man could be expected to do — he remained silent"), *Rothschild* v. *State of New York,* 388 F. Supp. 1346, 1350 (S.D.N.Y. 1975), *aff'd on other grounds,* —— F. 2d —— (No. 75-2042, 2d Cir., filed September 25, 1975), see

United States v. *Tyler,* 505 F.2d 1329, 1333 (5th Cir. 1975), *United States* v. *Matos,* 444 F.2d 1071 (7th Cir. 1971), but see *Agnellino* v. *State of New Jersey,* 493 F.2d 714 (3rd Cir. 1974). Though neither the state nor habeas corpus record reflects whether petitioner was told of his *Miranda* rights, there was uncontradicted evidence at his state court trial that petitioner's attorney had advised him to remain silent. See *Harp, supra,* 513 F.2d at 790 n. 7, *Commonwealth v. Jones,* 229 Pa. Super. 236, 327 A.2d 638, 643 (1974). Similarly, this court has recognized that silence often is, at best, ambiguous. See *Glinsey* v. *Parker,* 491 F.2d 337, 342 (6th Cir.), *cert. denied,* 417 U.S. 921 (1974) (holding that state defendants' silence in face of co-defendants' inculpating statements insufficient to constitute defendants' adoption of such statements because "[o]ne in custody has the right to remain silent and it would violate rights guaranteed by the Fifth Amendment to hold that such a person, by his silence, has acquiesced in a statement made by another in his presence which implicates him in a crime"); *Luallen* v. *Neil,* 453 F.2d 428 (6th Cir. 1971), *cert. denied,* 409 U.S. 857 (1972).

We, of course, have no supervisory role over Kentucky criminal courts, and can disturb a state conviction only on the ground of constitutional error. Other courts, however, have found constitutional error in the admission of, and comment on, pre-trial silence for impeachment. E.g., *Deats, supra; Patterson, supra; Bobo, supra; Bennett, supra;* see *Brinson, supra.*

The failure of petitioner, or his counsel, to timely object at trial to the admission of, and comment on, pretrial silence for impeachment, though precluding state ap-

pellate review, 478 S.W.2d at 718, cannot preclude federal habeas corpus relief in the absence of even a suggestion that such failure, rather than being an inadvertent oversight,[3] was an attempted "deliberate bypass" of state court procedure. *Fay* v. *Noia,* 372 U.S. 391, 438 (1963); *Deats, supra,* 477 F.2d at 1024. See also *Henry v. Mississippi,* 379 U.S. 443 (1965). Indeed, habeas corpus relief has been granted because of such admission and comment in the absence of objection. *Deats, supra; Patterson, supra;* see *Brinson, supra; United States* v. *Holland,* 360 F. Supp. 908, 910 (E.D.Pa.), *aff'd without published opinion,* 487 F.2d 1395 (3rd Cir. 1973). See also *Lebowitz, supra,* 313 So.2d at 476-477. But see *Egger* v. *United States,* 509 F.2d 745, 747 (9th Cir. 1975); *Fairchild, supra,* 505 F.2d at 1384; *United States* v. *Rose,* 500 F.2d 12 (2d Cir. 1974); *Ramirez, supra.*. Those courts' willingness to review those convictions accords with the federal courts' general willingness to review the constitutionality of the admission of evidence, even in the light of failure to comply with a state requirement of contemporaneous objection. *Marshall* v. *Rose,* 499

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[3] The failure of petitioner's attorney to object to the cross-examination and closing argument underlies, in part, petitioner's claim, on the instant petition for a writ of habeas corpus, of ineffective assistance of counsel. The district court, however, found no "ineptness or negligence on the part of counel which deprived the petitioner of any substantial defense," specifically noting that "[a]lthough defense counsel made no formal objection to the testimony pertaining to the lately-voiced alibi, counsel forcefully pointed out that his silence was on counsel's advice." The instant appeal fails to challenge that finding of the district court.

F.2d 1163, 1164 n. 1 (6th Cir. 1974). See *Miranda* v. *Arizona*, 384 U.S. 436, 495 n. 69 (1966). See generally White, Federal Habeas Corpus: The Import of the Failure to Assert a Constitutional Claim at Trial, 58 Va. L. Rev. 67 (1972). Though some courts of appeals have remanded to district courts for evidentiary hearings "upon the question of whether [petitioner] by-passed or waived his [constitutional] claim," e.g., *Pineda* v. *Craven*, 424 F.2d 369, 371 (9th Cir. 1970), *Smiley* v. *California* 442 F.2d 1026 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972), we see no reason for such remand where, as here, there is no suggestion, either in the record or in respondent's brief, of a "deliberate bypass." Accord, *United States ex rel. Macon* v. *Yeager*, 476 F.2d 613, 614-15 n. 2 (3rd Cir.), *cert. denied*, 414 U.S. 855 (1973); see *Blaylock* v. *Fitzharris*, 455 F.2d 462, 464 (9th Cir.), *cert. denied*, 409 U.S. 948 (1972) (evidentiary hearing if "genuine" issue of deliberate bypass).

We recognize that constitutional error in using pretrial silence to impeach trial testimony may on occasion be harmless error. *Rothschild, supra, Holland, supra*, 360 F. Supp. at 913; see *Glinsey, supra*, 491 F.2d at 343-44. See generally, *Chapman* v. *California*, 368 U.S. 18 (1967). However, to find harmlessness beyond a reasonable doubt we would have to conclude that, absent the cross-examination and closing argument, "no juror could have entertained a reasonable doubt" as to petitioner's guilt. *Matos, supra*, 444 F.2d at 1073. We feel that we cannot in good conscience make such a finding. First, evidence of petitioner's guilt was far from being overwhelming, *Glinsey, supra*, 491 F.2d at 344, *United States* v. *Blakemore*, 489 F.2d 193, 196 (6th Cir. 1973), *United States*

v. *Davis*, 459 F.2d 167, 172 (6th Cir. 1972). While we do not agree with petitioner's claim on appeal that the evidence against him "was so lacking in probative or evidentiary value as to deprive him of his due process rights," it must be recognized that the robbery victim's line-up identification of petitioner was far from conclusive,[4] and that the only other inculpatory evidence was the testimony of an acquaintance that he saw petitioner near the scene of the robbery and murder within fifteen or twenty minutes thereof. Second, evidence of petitioner's pre-trial silence could easily have been prejudicial.

> "The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest." *Hale, supra*, 95 S. Ct. at 2138.

The judgment of the District Court is reversed and the case is remanded with instructions to grant the writ of habeas corpus unless the state proceeds to retry peti-

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[4] The surviving robbery victim initially identified a man other than petitioner out of a five-man line-up. It was only after the police informed the victim that the man he had chosen could not possibly have committed the crime, that he said "the No. 3 man [petitioner] looks like the one who pulled the trigger." Trial Transcript 32. The victim's explanation was that originally he was looking for petitioner's co-defendant.

tioner within a reasonable time, but to await the outcome of any proceedings taken by the state to the Supreme Court.

WEICK, Circuit Judge, dissenting.

Minor was convicted by a jury in the state court for armed robbery and murder. The prosecution's case rested upon an in-court identification of Minor as one of the assailants by Hugh Albright, an eye witness, and testimony of Ronald McGoffney, who testified that he saw Minor near the scene of the crime shortly before it occurred. Minor's defense consisted of an alibi that he was home asleep at the time of the incident in question. This alibi was corroborated by two of his sisters and an aunt.

Following his conviction, Minor did not take a direct appeal. However, he subsequently filed a motion to vacate the judgment and conviction pursuant to Rule 11.42 Kentucky Rules of Criminal Procedure. This motion was overruled, but a belated appeal was granted.

In his belated appeal, Minor presented two arguments in an effort to reverse his conviction. First, he contended that the evidence presented was insufficient to support the jury's verdict; and second, he contended that he was prejudiced by the prosecuting attorney's closing argument which referred to his failure to communicate his alibi story to police at the time of his arrest.

The Kentucky Court of Appeals affirmed the judgment of conviction. *Minor* v. *Kentucky,* 478 S.W.2d 716 (Ky. 1971), *cert. denied,* 409 U.S. 1064 (1972), 415 U.S. 929 (1974).

Minor then filed with the District Court a petition for a writ of habeas corpus.

The District Court denied his petition without an evidentiary hearing. Minor appealed to this Court.

Because we were unable to determine whether the District Court had the benefit of the record and transcript of the proceedings in the state courts, we remanded the case for additional proceedings and a determination of petitioner's rights either based on an examination of the record of the state court proceedings or an evidentiary hearing.

After examining the record of the state court proceedings which it held was adequate, the District Court again denied the petition, concluding that there had not been a deprivation of constitutional rights and that an evidentiary hearing was not required.

We granted Minor's motion to proceed on appeal *in forma pauperis,* and his application for a certificate of probable cause. We also appointed counsel.

Minor's principal claim of error relates to the prosecutor's cross-examination of him concerning his failure to inform the police about his alibi at the time of his arrest and the prosecutor's comments thereon in his closing argument.

When Minor learned that the police were looking for him he reported to the police station with his lawyer. Minor was asked if he desired to make a statement and his reply was that his lawyer had advised him not to give

a written statement. The record does not show that he was even given *Miranda* warnings.[1]

The cross-examination by the prosecutor was as follows:

> Q. Now, tell this jury, please, if you have ever told between June 28th, 1968 and this good day June 11th, 1969 if you'd ever told the story before to anyone, including the police, that you were home this night asleep.
>
> A. Yes, well, I discussed it with my attorney.
>
> Q. I understand that. I'm asking if you told the police that night when you went to headquarters or if you ever told anyone besides your attorney until this good day that you were at home that night?
>
> Mr. Shobe: I will stipulate, Your Honor, that I advised my client not to discuss this with the police.
>
> Mr. Ousley: Oh, no, Mr. Shobe, I'm not saying anything about you. I'm just asking the question if he told anyone besides his attorney.
>
> The Court: Overruled. I'm going to let the witness answer.
>
> Witness: I hadn't discussed anything with anyone other than my lawyer.

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[1]**Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).**

> Mr. Ousley: I understand, that's what you are telling the jury. You did not tell the police a year ago this story that you're telling the jury today, did you?
>
> A. No, I . . . .
>
> Q. On the advice of your attorney. I understand that; correct?
>
> A. Correct.
>
> Q. You never told anyone else; correct?
>
> A. Correct.

In his closing argument to the jury the prosecutor stated:

> And here's something that I do not understand and I've been at this game a long time. If you are wanted for a crime you didn't commit and you knew police were looking for you, any decent, good citizen would go to the police and say, 'I was at home in bed.' What happened here? Nearly a year later he comes up with this phony alibi . . . 'I was at home in bed.' Now, I submit, think about that. If you were charged with an offense or if I am, or the Judge is, why, the first thing we would do would be to go to the police . . . 'Mr. Policeman, you're all wrong. I was at home in bed and my two sisters will tell you that.' But, oh no, McGoffney, who was down there, told the police he saw two men. The police immediately draw these two mugs. Of course! Good police work. And not until a year later — 'I'll tell you nothing' — not quoting the evidence literally — 'I'll tell you

> nothing. Prove it on me.' And he told them nothing on the advice of his counsel, and I'm not criticizing counsel, that was proper advice, and a year later — ' I was home in bed.' And who says he was home in bed? I'm not going to comment. His good aunt, who, of course, didn't see him after 10:00 o'clock on the 27th, and his two sisters. Someone is mistaken or not telling the truth.

Minor did not object either to the cross-examination or the prosecutor's argument to the jury. Under Kentucky law he is deemed to have waived objection and appellate review is precluded. *Minor* v. *Kentucky, supra. Cf., Johnson* v. *United States,* 318 U.S. 189 (1943).

In *Miranda* v. *Arizona,* 384 U.S. 436 (1966), after concluding that a defendant had the right to be advised that he could maintain silence in the face of police interrogation, the Court went on to state at 468 n. 37:

> [I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Cf., Griffin* v. *California,* 380 U.S. 609 (1965); *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964) . . . .

Relying on this dictum in *Miranda,* we held in *United States* v. *Brinson,* 411 F.2d 1057 (6th Cir. 1969), that cross-examination and comment, of the sort in question in the present case, were prejudicial error of constitutional magnitude. We stated at 1060:

> Brinson's silence was not offered in evidence as a tacit admission in response to an accusatory statement. Nevertheless, he had the same right to remain silent following his arrest . . . . Since he had no duty to disclose his defense to any law enforcement officer or prosecuting authority, permitting the inquiry pursued at trial by the United States Attorney was error of constitutional magnitude . . . .

Other Circuits reached the same conclusion. *E.g., United States* v. *Semensohn,* 421 F.2d 1206 (2nd Cir. 1970); *Fowle* v. *United States,* 410 F.2d 48 (9th Cir. 1969; *Gillison* v. *United States,* 399 F.2d 586 (D.C. Cir. 1968).

Respondent argues that our decision in *Brinson* has been eroded by the decision of the United States Supreme Court in *Harris* v. *New York,* 401 U.S. 222 (1971), which held that a defendant could be impeached by prior inconsistent utterances made at the time of arrest, even through the utterances were made before the defendant had been advised of his *Miranda* rights.

The basis for respondent's contention is that Minor's silence at the time of his arrest was inconsistent with his subsequent alibi testimony, thereby justifying comment on his prior silence for impeachment purposes.

In United States v. *Ramirez,* 441 F.2d 950 (5th Cir.), *cert. denied,* 404 U.S. 869, *rehearing denied,* 401 U.S. 987 (1971), the Fifth Circuit applied the *Harris* rationale to include the right of the prosecution to impeach the defendant by a prior inconsistent act of remaining silent at the time of arrest. The *Ramirez* rationale was subsenquently followed by the Third Circuit, *United States ex rel. Burt* v. *New Jersey,* 475 F.2d 234 (3rd Cir.), *cert.*

denied, 414 U.S. 938 (1973); *Agnellino* v. *New Jersey,* 493 F.2d 714 (3rd Cir. 1974).

The *Ramirez* rationale was rejected by the Tenth Circuit and the Circuit Court of Appeals for the District of Columbia. *Johnson* v. *Patterson,* 475 F.2d 1066 (10th Cir.), *cert. denied,* 414 U.S. 878 (1973); *Deats* v. *Rodriquez,* 477 F.2d 1023 (10th Cir. 1973); *United States* v. *Anderson,* 498 F.2d 1038 (D.C. Cir. 1974); *United States* v. *Hale,* 422 U.S. 171 (1975).

Hale was affirmed by the Supreme Court but not on the ground that there had been a violation of his constitutional rights. The court, exercising its supervisory powers over the administration of justice in the federal courts, held that the cross-examination and comments of the prosecutor concerning Hale's prior silence constituted prejudicial error.

In a separate concurring opinion, Chief Justice Burger stated:

> I cannot escape the conclusion that this case is something of a tempest-in-a-saucer and the court rightly avoids placing the result on constitutional grounds.

The highest court of Kentucky in affirming Minor's conviction, while not approving the prosecutor's closing argument to the jury, held that it was not prejudicial error.[2]

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[2]Apparently no question was raised in Kentucky's Court of Appeals about the cross-examination of Minor on this issue.

We do not possess supervisory powers over the administration of criminal justice in the Kentucky Courts. We are bound by its decision that the prosecutor's argument to the jury did not constitute prejudicial error under Kentucky law. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-26 (1945).

Brinson did decide the constitutional issue. *Brinson* was a federal prosecution. *Minor* is a state prosecution. There is a real conflict in the Circuits on the constitutional issue. The conflict was not resolved in *United States* v. *Hale, supra.*

It should be pointed out that *Miranda* has no application to the present case. Here Minor voluntarily went to the police station accompanied by his retained counsel who had advised him not to give any information to the police and he gave them none.

At his trial he voluntarily took the witness stand to testify as a witness in his own behalf. He testified as to his alibi and the prosecutor cross-examined him in detail on this subject. In particular, he was cross-examined as to why he had not told the police about his alibi at the time of his arrest. He testified that he told no one except his lawyer in the period from the date of his arrest in 1968 until the trial nearly a year later.

A number of states have statutes requiring a defendant in a criminal case to give written notice of his alibi if he intends to use it as a defense at his trial. Kentucky has no such statute.

The Supreme Court held that the privilege against self-incrimination is not violated by a state statute re-

quiring that a defendant give notice of his alibi defense and disclose his alibi witnesses. ***Williams*** **v. *Florida,*** 399 U.S. 78 (1970). The court noted that some sixteen states had adopted notice requirements and that they were designed to enhance the search for the truth by giving both the state and the defense the opportunity to investigate facts crucial to the issue of guilt or innocence. *Cf., United States* v. *Nobles,* 422 U.S. 225 (1975).

Minor could have avoided this issue entirely by not taking the witness stand. He could have offered his two sisters and his aunt as witnesses to establish his alibi. The state then could not have offered proof about any inconsistent act or conduct. *Oregon* v. *Hass,* 420 U.S. 714, 720-724 (1975). The trouble is that Minor apparently wanted to testify as a witness in his defense and to impress the jury with his testimony.

When Minor took the witness stand he was subject to cross-examination, the same as any other witness. The state had the right to impeach him by questioning him concerning any act or conduct on his part which was inconsistent with his testimony.

In *Oregon* v. *Hass, supra,* the Supreme Court followed *Harris* v. *New York, supra,* and held that inculpatory information furnished by a suspect in police custody (en route to the police station) after he had been given *Miranda* warnings, and had stated that he would like to telephone a lawyer, but was told that this could not be done until they reached the police station, can be used solely for impeachment purposes when the de-

fendant takes the witness stand and gives testimony inconsistent with such information.

Whether Minor's conduct in remaining silent was inconsistent with his testimony was a question of fact which the trial judge in his discretion could submit to the jury for determination. See *United States* v. *Hale,* 422 U.S. at [illegible], n. 7.

In 3A *Wigmore on Evidence* §1042, the author states under the topic of "(1) Silence, etc., as constituting the impeaching statement."

> A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact.

The Court of Appeals of Kentucky, after holding that the prosecutor's comments to the jury were not prejudicial, further stated:

> The defendant reported to the police three days after the date on which the crime was committed but did not testify until about one year later when his trial was conducted. But on his trial, he voluntarily took the witness stand and testified in his own behalf, ***thereby waiving his right to remain silent.*** So the Commonwealth's argument amounts to no more than to say that instead of giving his alibi to the jury at his trial, appellant should have given it to the police three days after the crime was committed. ***(Emphasis added.)***

Furthermore, the appellant made no objection to that part of the argument of the prosecuting at-

torney which pertained to his failure to go to the police and promptly report his alibi. Neither did the appellant move the court for a mistrial. Under these circumstances, we do not find that the appellant made sufficient objection on the trial to authorize appellate review. Wise v. Kentucky Home Mutual Life Insurance Co., Ky., 420 S.W.2d 573 (1967).

Considering the argument from both angles, we do not think it was prejudicial to the substantial rights of the appellant.

Kentucky has the right to provide for the manner of appellate review for cases tried in its courts and the consequences for failure to follow its required procedures. It is not the function of federal courts to review state court appellate procedures. Fed. R. Crim. P. Rule 52(b) has no application to state prosecution.

As we have previously pointed out, the rulings of the federal courts have been conflicting on the issue of self-incrimination.

In *Raffel* v. *United States,* 271 U.S. 494 (1926), Mr. Justice Stone who wrote the opinion for the court stated:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses and not for those who do.

The court held that when the defendant became a witness he waived his Fifth Amendment rights.

It has been claimed that *Johnson* v. *United States,*

318 U.S. 189 (1943), has overruled *Raffel* but I do not so read it. *Johnson* did hold that the withdrawal of an exception to the prosecutor's argument operated as a waiver of objection. This is equivalent to not making any objection, which is what happened here. *Johnson* conforms to Kentucky law.

Grunewald v. *United States,* 353 U.S. 391 (1957), distinguished *Raffel* and focused on the question whether there was any inconsistency between the refusal of the defendant to answer questions before the Grand Jury and his testimony at the trial. As we have stated, this was an issue which the state court in the present case determined adversely to Minor.

Finally, in *United States* v. *Hale, supra,* these authorities are further analyzed with the result that the Court declined to pass upon the constitutional issue and ruled that under its supervisory powers the inquiry into Hale's silence constituted prejudicial error.

The Kentucky Court of Appeals had the right to decide whether the comments of the prosecutor constituted prejudicial error under Kentucky law and also whether the issue was properly before the court for appellate review. I find no error of constitutional dimensions in the decision of the Court of Appeals of Kentucky which held that the issue was not properly before the court for appellate review or in its failure to find prejudicial error in the argument of the prosecutor. Where the decision of the state court rests in part on adequate and independent state grounds the federal courts are not privileged to review it. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-26 (1945);

Oregon v. *Hass, supra,* dissenting opinion of Justice Marshall.

The overwhelming evidence in this case supports the jury verdict of guilty of murder and robbery. In my opinion Minor received a fair trial. He also received appellate review of his conviction by Kentucky's highest court, which held:

> Minor voluntarily took the witness stand and testified in his own behalf thereby waiving his right to remain silent . . . .

Cf., Raffel v. *United States, supra.*

Minor was subject to cross-examination about his acts and conduct, the same as any other witness. The Kentucky Court was also within its rights in holding that Minor, by his failure to object at the trial, either to the cross-examination or to the prosecutor's argument to the jury, was not entitled to appellate review.

In my opinion federal intervention in this case by the writ of habeas corpus is not authorized. The District Judge properly denied the writ, and I would affirm.

COURT OF APPEALS OF KENTUCKY

Dec. 3, 1971.

JOHN ALLEN MINOR, ... APPELLANT

V.

COMMONWEALTH OF KENTUCKY, ... APPELLEE

Rehearing Denied April 28, 1972.

EDWARD P. HILL, JR., JUDGE

This is a belated appeal granted by the Jefferson Circuit Court in a hearing on appellant's RCr 11.42 motion to vacate a 1969 conviction on charges of armed robbery and wilful murder. The appellant was given two life sentences. He presents two arguments in an effort to reverse his conviction. First he contends the evidence was insufficient to support the verdict of the jury; and second, he insists that the attorney for the Commonwealth made inflammatory and prejudicial argument.

[1] While there was some confusion in the identification of the appellant and his codefendant, there was clear and positive evidence as to the identity of the appellant and as to the fact that appellant and his codefendant were equally guilty in a joint undertaking to rob the complaining witness and his companion; and that in the process of doing so, the companion was shot and killed. We think the evidence was sufficient to sustain and support the verdict.

[2, 3] Furthermore, it appears from the record, and is admitted by counsel for appellant, that appellant's trial counsel made no motion for a directed verdict of acquittal either at the close of the Commonwealth's case or at the close of all the evidence. The first mention of the sufficiency of the evidence to convict appears in appellant's motion and grounds for a new trial. Consequently, the trial court had no opportunity during the trial to rule on the sufficiency of the evidenc to support the verdict. RCr 10.12. The claimed error of the trial court was not preserved for appellate review. It is only in cases where the judgment of conviction imposes the death penalty that this court will abrogate its well-established rule of procedure and review questions that have not been previously preserved for appellate review. Cf. Anderson v. Commonwealth, 302 Ky. 275, 194 S.W. 2d 530.

In fairness to appellant's present counsel, it should be observed here that he was not the attorney representing appellant at the trial court level.

[4] Next we turn to appellant's contention that he was prejudiced by the closing argument for the Commonwealth. We quote herewith the portion of the argument for the Commonwealth which is charged to be prejudicial:

> "* * * If you are wanted for a crime you didn't commit and you knew the police were looking for you, any decent, good citizen would go to the police and say, 'I was at home in bed.' * * * Now, I submit, think about that. If you were charged with an offense or if I am, or the Judge is, why the first

> thing we would do would be to go to the police — 'Mr. Policeman, you're all wrong. I was at home in bed and my two sisters will tell you that.' * * * And not until a year later—'I'll tell you nothing'—not quoting the evidence literally—'I'll tell you nothing. Prove it on me.' And he told them nothing on the advice of his counsel and I'm not criticizing counsel * * *. Let me call your attention to something. Why wasn't the co-defendant called? The processes of this Court are open. Why wasn't Leon Wilson called and put on the witness stand?
>
> "MR. SHOBE: Judge, I would like to object because, of course the Commonwealth could have called him, too.
>
> "THE COURT: That's true. Either side could have called him.
>
> "MR. OUSLEY: I will accept that statement with some reservation. I will accept it but what will these fellows tell the Commonwealth of Kentucky? What will they tell the police? Why, they'll laugh in your face and they'll spit in your face. They'll tell the Commonwealth nothing. That's the reason the Commonwealth doesn't call them. We could have called him. Wilson, if it is true, could have said 'It's over with. It's the end.' He could have said 'He wasn't with me.' They didn't dare call him."

The only objection to the argument of the Commonwealth's attorney is copied above. That objection related to the fact the appellant did not call as a witness his

codefendant, Leon Wilson. This objection was not based upon the right of Leon Wilson not to testify because it might tend to incriminate him. This record is silent as to whether or not Leon Wilson had previously entered a plea of guilty to the charge. If he had done so, then his constitutional rights under the Fifth Amendment to the United States Constitution would have been in no manner violated by his being called as a witness by the appellant herein. From the nature of appellant's objection and the trial court's comment to the effect that "either side could have called him," it is apparent that both the Commonwealth and the defense as well as the trial court considered Leon Wilson a competent witness for either side. We do not mean to condone such an argument; but under the peculiar circumstances, we do not find this reference by the prosecution to have been prejudicial to the appellant's substantial rights Pennewell v. United States. 122 U.S. App. D.C. 332, 353 F. 2d 870 (1965).

[5] Also copied hereinbefore as a part of the Comwealth's argument to which objection is now made in this court is a reference to the appellant's failure to "go to the police" and explain his whereabouts on the night the crime was committed. We know of no law, past or present, which requires a man charged with or suspected of a crime to go to the officers of the law to explain his innocence. Assuredly he is not required to testify in his own behalf on the final trial of his case before the jury. If he may safely decline to testify in his own half on his trial, he certainly may decline to report to the police and decline to make any statement or comment.

We have no hesitancy in condemning such an argument by the prosecuting attorney; yet, we must pursue the matter further and make the inquiry whether or not the substantial rights of the appellant were prejudiced by this improper argument.

The defendant reported to the police three days after the date on which the crime was committed but did not testify until about one year later when his trial was conducted. But on his trial, he voluntarily took the witness stand and testified in his own behalf, thereby waiving his right to remain silent. So the Commonwealth's argument amounts to no more than to say that instead of giving his alibi to the jury at his trial, appellant should have given it to the police three days after the crime was committed.

[6] Furthermore, the appellant made no objection to that part of the argument of the prosecuting attorney which pertained to his failure to go to the police and promptly report his alibi. Neither did the appellant move the court for a mistrial. Under these circumstances, we do not find that the appellant made sufficient objection on the trial to authorize appellate review. Wise v. Kentucky Home Mutual Life Insurance Co., Ky., 420 S.W.2d 573 (1967).

Considering the argument from both angles, we do not think it was prejudicial to the substantial rights of the appellant. RCr 9.24 and Clatos v. Commonwealth, 298 Ky., 851, 184 S.W. 2d 125.

The judgment is affirmed.

All concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 7537-G

JOHN ALLEN MINOR, ... PETITIONER

v.

HAROLD E. BLACK, SUPERINTENDENT,
KENTUCKY STATE REFORMATORY, ... RESPONDENT

ORDER

By order entered March 29, 1974, we dismissed the petitioner's petition for writ of habeas corpus after having examined the state court Transcript of Record in two volumes and the Transcript of Evidence and Proceedings supplied by the respondent. The petitioner has now filed a motion for leave to proceed in forma pauperis on appeal and has filed an application for certificate of probable cause.

We examined carefully the Record of Proceedings in petitioner's case and concluded that the closing argument of the prosecutor, about which the petitioner complained, was fair comment on petitioner's credibility and was in no way violative of his Fifth or Fourteenth Amendment rights. We further concluded that the lineup procedure employed in this case was not unnecessarily suggestive or conducive to a mistaken identification and that he was not denied due process by the procedure employed. Further, there was proper, independent in-court identifi-

cation of the petitioner. *Stovall* v. *Denno,* 388 U.S. 293 (1967); *cf Clemmons* v. *United States,* 408 F. 2d 1230 (D. C. Cir. 1968). We further conclude after an examination of the record that the petitioner was not deprived of any substantial defense because of any alleged ineptness or negligence on the part of his counsel, and that he was not denied his Sixth Amendment right to the effective assistance of counsel. His contentions have received careful consideration by the highest Appellate Court in Kentucky and have been found to be nonmeritorious. *Minor* v. *Commonwealth, Kentucky,* 478 S.W. 2d 716 (1973). We are of the opinion, likewise, that his claims are without merit and hereby certify that the appeal is without merit and his certificate of probable cause is hereby denied.

Date: May 10, 1974

/s/ James F. Gordon

United States District Judge

Copies to:

JOHN ALLEN MINOR, Petitioner

ED W. HANCOCK, Attorney General,
Commonwealth of Kentucky

United States Magistrate

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

No. 7537-G

JOHN ALLEN MINOR, PETITIONER

V.

HAROLD E. BLACK, WARDEN, RESPONDENT

MEMORANDUM AND ORDER

We dismissed the petitioner's petition for writ of habeas corpus on March 27, 1973, without an evidentiary hearing, and thereafter granted his requests for a certificate of probable cause and for permission to proceed in forma pauperis on appeal. The case was remanded to this Court by the Sixth Circuit Court of Appeals "for additional proceedings and a determination of petitioner's rights either based on a examination of the state court proceedings or an evidentiary hearing." In response to our order thereafter entered, the respondent has filed with the records of this case the Transcript of Record in two volumes and the Transcript of Evidence and Proceedings. We conclude upon a careful examination of these transcripts that these records clearly establish that petitioner was not deprived of any constitutional rights and that an evidentiary hearing is not required, nor would it aid in the determination of the issues presented in the petition. *Townsend* v. *Sain,* 372 U.S. 293 (1963).

Following trial by jury on June 11, 1969, at which

petitioner was represented by employed counsel, petitioner was convicted of armed robbery and murder, and was sentenced to life on each count, the terms to run concurrently. A motion for a new trial was denied. A direct appeal was not taken. In 1970 he filed a motion to vacate the judgment and conviction pursuant to Rule 11.42, Kentucky Rules of Criminal Procedure. The motion was overruled but he was granted a belated appeal. The issues herein raised were raised on appeal to the Kentucky Court of Appeals, which affirmed the conviction. *Minor* v. *Commonwealth, Ky.*, 478, S.W. 2d 716 (1971).

In this petition it is asserted that the conviction was unlawfully obtained because (1) the prosecutor in the closing argument made improper comments concerning the failure of the petitioner to make a statement to police when he first was interrogated, as well as remarks concerning his failure to call as a witness the alleged coactor in the crime whose case had already been disposed of; (2) that the lineup identification was contradictory and insufficient to support the verdict; and (3) that his counsel's failure to make certain objections and motions deprived him of his Sixth Amendment rights to the assistance of counsel.

In disposing of the first issue in our original order of dismissal, we stated that "we have examined the quoted portions of the closing statements . . ." and found them nonprejudicial. These quoted portions were set forth verbatim in petitioner's pleadings and are contained on pages 87, 88, and 89 of the Transcript of Evidence and Proceedings. We have again examined in the full context these comments to which the petitioner objects, and

are of the opinion that they are not violative of his Fifth or Fourteenth Amendment rights. It was fair comment on petitioner's credibility to note that he first voiced his alibi at trial some eleven months after he was first questioned about the crimes.

The prosecutor in his closing argument referred to the fact the petitioner did not call the co-defendant [Leon Wilson] as a witness, and offered an explanation why the Commonwealth had not done so. From the record we know only that the co-defendant's case at time of petitioner's trial "ha[d] been disposed of." (T.E. 15). The witness was apparently available to either side, as the court observed, (T.E. 88) and we do not know which side would be favored by his testimony, if either, or if he would testify should he have any privilege to waive. He had been brought from the penitentiary on motion of the Commonwealth for the purpose of testifying. If we assume that the remark was improper and that the observation voiced by the court was not sufficiently curative, we do not believe it was so highly prejudicial as to deprive him of due process.

The remaining issues deal with the lineup identification, the sufficiency of the evidence identifying him with the crimes, and the allegation of ineffective assistance of counsel. He alleges that his retained attorney permitted continuances, failed to ascertain the identity of prosecution witnesses, did not move for a Bill of Particulars, and failed to make timely objections to questions and arguments relating to the alibi and his failure to call the co-defendant as a witness.

A brief resume of the testimony may be helpful in

disposing of these issues. During the early morning hours of June 28, 1968, the murder victim, Carroll Mulliken, and a friend, Wesley Albright, both had been "bar hopping" for several hours. While enroute in Albright's car to another bar, at about 1:30 a.m., they were hailed over on 18th Street between Oak and Dumesnil by a man identified by Albright to be the petitioner. The latter offered to escort them to a nearby house where they could play cards, and he got into the automobile. Following his directions they went around the corner, stopped and got out of the car. They started back between two buildings when a fourth individual appeared. Petitioner and the newly arrived individual pulled guns. In Albright's words:

> "Both of them pulled revolvers out of their pocket and said they wanted our money. One man took my watch and wallet. Mulliken tried to grab the gun and when he did, the man went backwards. He sorta' went side of the building and I heard a gun go off. When this happened, the other man put a gun to my head and told me not to make a move." (T.E. 15)

According to Albright, the man wrestling with Mulliken was petitioner. Other testimony established that Mulliken died from the gunshot wound.

Ronald McGoffney, who said he had known petitioner "for a long time" while riding by on 18th Street between Oak and Dumesnil saw the co-defendant talking to "two white boys" who were in a car and the petitioner was sitting in his car nearby. He stated the time was about 1:30 a.m. and the location was about a half block away

from the scene of shooting. He stopped at a nearby service station to chat with a friend and was there some few minutes later when Albright came in to call police and report the robbery and shooting. He was at the scene when the police arrived and reported to them that he had seen petitioner and Wilson in the area earlier.

Petitioner testified that on the night of June 27, he arrived home about 8 P.M., had dinner, and went to bed shortly thereafter and did not leave the house until after 9 A.M. the following day. Two sisters and an aunt testified to the same effect. He learned late on June 28 that the police were looking for him and on July 2 with his attorney he went to police headquarters. He made no statements concerning the accusations, on advice of counsel. He stated that the co-defendant was a friend of his, and that he knew McGoffney "vaguely."

Albright identified the petitioner as the man struggling with the shooting victim. It was elicited from him that 3 or 4 days following the incident he was called to view a lineup and that he pointed out an individual other than petitioner. His explanation was that he had been told that Wilson, who held the gun on him and whom he had identified from mug shots, had turned himself in and that was who he was looking for when he viewed the lineup, and when he left the room and was informed he had selected the wrong individual, he stated that "the No. 3 man [petitioner] looks like the one who pulled the trigger."

Albright's explanation as to why he did not select petitioner on first try is plausible. He was looking for the face that he had seen on the "other end of the barrel."

When told to look for the other man, he identified him forthwith.

We do not believe this procedure was unnecessarily suggestive or conducive to a mistaken identification so as to constitute a denial of due process. *Stovall* v. *Denno,* 388 U.S. 293 (1967). Further, Albright identified petitioner at trial, without hesitation, and the jury had the opportunity of judging his demeanor and assessing his credibility. *Cf Clemmons* v. *United States,* 408 F. 2d 1230, (D.C. Cir. 1968). Testimonial inconsistencies are almost inevitable in a trial. There was sufficient creditable testimony to associate petitioner with the crimes, if believed by the jury. Only if there is a total lack of creditable tesitmony would he be entitled to federal habeas corpus relief. *Fernandez* v. *Klinger,* 346 F. 2d 210 (9th Cir. 1965), cert. den. 86 S. Ct. 191; *Ballard* v. *Howard,* 403 F. 2nd 653 (6th Cir. 1968). See also *Edwards* v. *Wainwright,* 461 F. 2nd 238 (5th Cir. 1972); *Freeman* v. *Stone,* 444 F. 2d 113, (9th Cir. 1971).

We have examined the transcript at length with care, and we do not perceive any ineptness or negligence on the part of counsel which deprived the petitioner of any substantial defense. Petitioner does not allege, nor do we perceive how the trial delay may have prejudiced him. His alibi witnesses were clear in their testimony—they just were not believed. Permitting a delay in trial of a criminal case is often a preferred trial tactic by defense counsel and cannot be characterized per se as negligent. Nor can we say that the failure to move for a Bill of Particulars or a directed verdict resulted in prejudice to the petitioner. Although defense counsel made

no formal objection to the testimony pertaining to the lately-voiced alibi, counsel forcefully pointed out that his silence was on counsel's advice, and we believe the prosecutor's comment was fair under the circumstances. Counsel's failure to pursue further his objetion to the uncalled witness does not render his total performance ineffective and incompetent.

A federal court does not act as another reviewing court over state courts to correct each and every trial error which may be committed. *Sinclair* v. *Turner,* 447 F. 2d 1158 (10th Cir. 1971), cert. den. 92 S. Ct. 1329. Neither is every unsuccessful trial tactic indicative of incompetence. Defense counsel was vigorous in his cross-examination, presented an able alibi defense, and forcefully summarized and presented his client's case to the jury. Any imperfections or omissions in his performance did not deprive petitioner of a substantial defense.

The petition is dismissed.

Date: March 28, 1974

/s/ JAMES F. GORDON

United States District Judge

Copies to:

JOHN ALLEN MINOR, Petitioner

ED W. HANCOCK, Attorney General,
Commonwealth of Kentucky

United States Magistrate